

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 94-F-27

Date issued: September 1, 1994

Requested by: Alvin A. Jaeger, Secretary of State

- QUESTION PRESENTED -

Whether the Secretary of State has discretion under Article III, Section 5 of the North Dakota Constitution to determine at which statewide election an initiated measure shall be placed upon the ballot.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the Secretary of State does not have discretion under Article III, Section 5 of the North Dakota Constitution to determine at which statewide election an initiated measure shall be placed upon the ballot. Rather, the Secretary of State must place the initiated measure on the ballot at the next statewide election, whether primary, general, or special, that occurs at least ninety days after submission of the initiative petition.

- ANALYSIS -

Article III, Section 5 of the North Dakota Constitution provides as follows:

An initiative petition shall be submitted not less than ninety days before the statewide election at which the measure is to be voted upon. A referendum petition may be submitted only within ninety days after the filing of the measure with the secretary of state. The submission of a petition shall suspend the operation of any measure enacted by the legislative assembly except emergency measures and appropriation measures for the support and maintenance of state departments and institutions. The submission of a petition against one or more items or parts of any measure shall not prevent the remainder from going into effect. A referred measure may be voted upon at a statewide election or

at a special election called by the governor.

In Haugland v. Meier, 339 N.W.2d 100 (N.D. 1983), a referral petition was submitted to the Secretary of State. The petition recited, in part, that it "be placed upon the ballot and that it be submitted by the Secretary of State for either approval or rejection by the electors of the State of North Dakota at the next general election." Id. at 102. This statement designating or requesting the general election as a time for the referral was then challenged. Id. The court noted that Article III, Section 5 of the North Dakota Constitution provides that "'[a] referred measure may be voted upon at a statewide election or at a special election called by the governor.'" Id. at 105 (quoting N.D. Const. art. III, ? 5). The court then discussed the meaning of the term "statewide election," as used in Article III, Section 5 of the North Dakota Constitution, with regard to referred measures, and whether that term means the next statewide election. Id.

The court in Haugland first determined that a statewide election could be a primary, general, or special election "if all the electors are entitled to vote in the election." Id.; see also State ex rel. Kusler v. Sinner, 491 N.W.2d 382, 385 n.2 (N.D. 1992) ("A primary election is a statewide election that is held on the second Tuesday in June of every general election year. NDCC 16.1-11-01. A general election is a statewide election that is held in each even numbered year on the first Tuesday after the first Monday of November. NDCC 16.1-13-01. The June primary election and the November general election are both regularly scheduled statewide elections.").

The Haugland court further noted:

We recognize that the constitution does not specifically require that the referred measure be placed on the ballot at the next statewide election.

However, ? 5, Art. III not only provides that the referred measure be voted upon at a statewide election, but also provides for a special election which may be called by the governor. This indicates that the people sensed an urgency to get the matter voted upon and resolved.

339 N.W.2d at 105.

Thus, the court in Haugland determined that "the constitution implicitly requires that the referred measure be placed on the ballot at the next statewide election so that the subject matter can be resolved promptly. A deliberate delay could effectively destroy the referral process." Id.

The question presented here is whether the Secretary of State has discretion, under Article III, Section 5 of the North Dakota Constitution, to determine at which statewide election an initiated measure shall be placed on the ballot, or whether the initiated measure must be placed on the ballot at the next statewide election following submission of the completed initiative petitions. Although this issue was not addressed in Haugland, the court therein noted:

[I]f the proposition that the referral measure need not be placed on the ballot at the next statewide election were applied, as contended and argued by the sponsors, the results would be disastrous. If it is not at the next statewide election, when should it be placed on the ballot, in two, four, or ten years? If the constitutional provision were not construed to mean the next statewide election, the Secretary of State, if so inclined, could actually delay placing the matter on the ballot until the people would no longer be concerned with the issue or even indefinitely. This would bring about an absurd result which we should not do.

Id. at 105.

This reasoning applies with equal force to an initiated measure. If, when presented with completed petitions, the Secretary of State had discretion under Article III, Section 5 of the North Dakota Constitution, there would be no clear determination as to when the measure would be placed on the ballot. The Secretary of State could decide to delay placing the matter on the ballot "until the people would no longer be concerned with the issue or even indefinitely." Haugland v. Meier, 339 N.W.2d at 105. There would be no standards to guide the discretion of the Secretary of State, and if the Secretary of State happened to dislike a particular initiated measure, it could be, for example, placed on the ballot at an election with a historically low turnout if that would be detrimental to the measure, or it could be held indefinitely.

This would be an absurd result in applying a constitutional

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measure which the court in Haugland stated should not be allowed to occur.

In addition, Article III, Section 6 of the North Dakota Constitution provides that when the Secretary of State is passing on the sufficiency of petitions, if the petition is still being reviewed at the time the ballot is prepared, "the secretary of state shall place the measure on the ballot and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon." This provision is an indication that the drafters of the constitution intended that the measures presented to the Secretary of State be placed on the next election ballot.

Consequently, it is my opinion that Article III, Section 5 of the North Dakota Constitution does not give the Secretary of State the discretion to determine at which statewide election an initiated measure shall be placed on the ballot. Rather, the Secretary of State must place the initiated measure on the ballot at the next statewide election (primary, general, or special) that occurs at least ninety days after the submission of the initiative petition.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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